117 (2)

No. 08-470

Supreme Court, U.S.
FILED
JAN 26 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, *et al.*,

Petitioners,

v.

DOW CHEMICAL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

JOSEPH R. GUERRA
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005

RICHARD P. BRESS
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
MARY K. GARDNER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

Counsel for Monsanto Company, Monsanto Chemical Co., and Pharmacia Corp.

ADDITIONAL COUNSEL ON INSIDE COVERS

JAMES E. TYRRELL, JR.
PATTON BOGGS LLP
One Riverfront Plaza
Newark, NJ 07102

JOHN C. SABETTA
ANDREW T. HAHN
SEYFARTH SHAW LLP
620 Eighth Avenue, 32d Fl.
New York, NY 10018

Counsel for Monsanto Company, Monsanto Chemical Co., and Pharmacia Corp.

ANDREW L. FREY
CHARLES A. ROTHFELD
LAUREN R. GOLDMAN
CHRIS HOUPT
MAYER BROWN LLP
1675 Broadway
New York, NY 10022

JAMES L. STENGEL
LAURIE STRAUCH WEISS
ORRICK, HERRINGTON & SUTCLIFFE LLP
666 Fifth Avenue
New York, NY 10103

JAMES V. AIOSA
RIVKIN RADLER LLP
EAB Plaza
Uniondale, NY 11556

Counsel for The Dow Chemical Company

WILLIAM A. KROHLEY
WILLIAM C. HECK
KELLEY DRYE & WARREN LLP
101 Park Avenue
New York, NY 10178

Counsel for Hercules Incorporated

MICHAEL M. GORDON
MCKEE NELSON LLP
One Battery Park Plaza
New York, NY 10004

Counsel for Occidental Chemical Corporation, as successor by merger to Diamond Shamrock Chemicals Company; Maxus Energy Corporation; Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc.; and Valero Energy Corporation, as successor by merger to Ultramar Diamond Shamrock Corporation

LAWRENCE D'ALOISE
CLARK, GAGLIARDI & MILLER
99 Court Street
White Plains, NY 10601

Counsel for Harcros Chemicals, Inc., T-H Agriculture & Nutrition Co., Thompson Chemical Corporation, and Thompson Hayward Chemical Co.

MYRON KALISH
50 East 79th Street
New York, NY 10021

Counsel for C.D.U. Holding Inc., Uniroyal Chemical Acquisition, Uniroyal Chemical Co. Inc., Uniroyal Chemical Holding Company, and Uniroyal, Inc.

ANNE E. COHEN
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022

Counsel for Hooker Chemical Entities

STEVEN H. HOEFT PC
MCDERMOTT WILL &
EMERY LLP
227 West Monroe Street
Suite 2400
Chicago, IL 60606

Counsel for Riverdale Chemical Company

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied the "demanding standard" of *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), to conclude that respondents' conduct in supplying the U.S. military with Agent Orange and other herbicides for use in destroying vegetation during the Vietnam conflict—which use allegedly had unintended but foreseeable toxic effects on humans—violated no norm of international law that was sufficiently accepted and definite so as to support the recognition of a federal common law cause of action.

2. Whether the court of appeals correctly affirmed the dismissal of petitioners' state-law tort claims based on the government contractor defense.

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the Rules of the Supreme Court, respondents hereby state:

1. **Monsanto Company.** Monsanto Company has no publicly owned parent corporation, and no publicly held corporation owns more than 10 percent of Monsanto's stock.

2. **Monsanto Chemical Company.** Monsanto Chemical Company, which no longer exists, is a corporate predecessor of Pharmacia Corp., which is a wholly-owned subsidiary of Pfizer Inc., a publicly held corporation.

3. **The Dow Chemical Company.** The Dow Chemical Company has no parent corporations and no publicly held company owns 10 percent or more of its stock.

4. **Occidental Chemical Corporation.** Occidental Chemical Corporation, the successor by merger to Diamond Shamrock Chemicals Company (which was known prior to September 1, 1983, as Diamond Shamrock Corporation), is an indirect, wholly-owned subsidiary of Occidental Petroleum Corporation, a publicly held company.

5. **Valero Energy Corporation.** Valero Energy Corporation, the successor by merger to Ultramar Diamond Shamrock Corporation, has no parent corporation, and there is no publicly held company owning 10 percent or more of the corporation's stock.

6. **Maxus Energy Corporation.** Maxus Energy Corporation is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 85 percent of YPF's stock is owned by Repsol YPF S.A. ("Repsol

YPF"); approximately 15 percent of YPF's stock is held by The Peterson Group, a private corporation. Repsol YPF is publicly held.

7. Tierra Solutions, Inc. Tierra Solutions, Inc., formerly known as Chemical Land Holdings, Inc., is an indirect, wholly-owned subsidiary of YPF S.A. ("YPF"). Approximately 85 percent of YPF's stock is owned by Repsol YPF S.A. ("Repsol YPF"); approximately 15 percent of YPF's stock is held by The Peterson Group, a private corporation. Repsol YPF is publicly held.

8. Hercules Incorporated. Hercules Incorporated is a wholly owned subsidiary of Ashland, Inc.

9. Uniroyal, Inc. Uniroyal, Inc. is a dissolved corporation.

10. Uniroyal Chemical Co.; Uniroyal Chemical Holding Company and Uniroyal Chemical Acquisition Corporation. Uniroyal Chemical Holding Company and Uniroyal Chemical Acquisition Corporation were predecessors and/or wholly-owned subsidiaries of Uniroyal Chemical Co. Uniroyal Chemical Co. is a wholly-owned subsidiary of Chemtura Corp., a publicly held company.

11. C.D.U. Holdings, Inc. C.D.U. Holdings, Inc. is a dissolved corporation.

12. Hooker Chemical Corporation; Hooker Chemical Far East Corporation; and Hooker Chemicals & Plastics Corp. Hooker Chemical Corporation; Hooker Chemical Far East Corporation; and Hooker Chemicals & Plastics Corp. are or were predecessors and/or wholly-owned subsidiaries of Occidental Chemical Corporation, an indirect, wholly-owned subsidiary

of Occidental Petroleum Corporation, a publicly held company.

13. TH Agriculture & Nutrition Company, Inc.; Thompson-Hayward Chemical Co.; and Harcros Chemical, Inc. TH Agriculture & Nutrition Company, Inc. (now known as TH Agriculture & Nutrition L.L.C.) is a wholly-owned subsidiary of Philips Electronics North America Corporation, formerly known as North American Philips Corporation. Philips Electronics North America Corporation is an indirect wholly-owned subsidiary of Koninklijke Philips Electronic N.V., a publicly held corporation based in the Netherlands. Thompson-Hayward Chemical Co. was a former subsidiary of North American Philips Corp. which no longer exists. These assets of Thompson Hayward Chemical Co. were purchased by Harcros Chemical Inc., which is a completely separate entity from Philips Electronics North America Corporation.

14. Riverdale Chemical Company. Riverdale Chemical Company is now known as Nufarm Americas, Inc., which is a privately held company. Nufarm Americas, Inc. is owned by Nufarm Americas Holding Co., and no publicly held corporation owns 10 percent or more of Nufarm Americas Holding Co.'s stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vii

STATEMENT 1

ARGUMENT 12

I. PETITIONERS ASSERT NO SPLIT OF AUTHORITY BETWEEN THE COURTS OF APPEALS, AND THEIR REQUEST FOR ERROR CORRECTION UNDER *SOSA* DOES NOT MERIT REVIEW 14

A. The *Sosa* Standard 14

B. The Second Circuit Correctly Determined That Petitioners' Poison Claim Fails *Sosa*'s Standard 15

1. The Poison Proscription Fails The *Sosa* Standard Because It Is A Highly General Norm, Whose Operative Scope Is Vague And Has Been Applied Narrowly 16

2. Petitioners' Claim Independently Fails Because There Is No Allegation That Agent Orange Was Used With The Purpose Of Poisoning Human Beings 20

3. Petitioners' Other Allegations Of Error Lack Merit 23

TABLE OF CONTENTS—Continued

Page

C. The Court Of Appeals Correctly Determined That Petitioners' Claims Based On The Norm Of Proportionality And The Related Norm Against "Unnecessary Suffering" Fail Under *Sosa* 26

II. SEVERAL ALTERNATIVE GROUNDS SUPPORT DISMISSAL OF PETITIONERS' ATS CLAIMS 29

III. THE SECOND CIRCUIT'S DECISION UPHOLDING THE DISMISSAL OF PETITIONERS' STATE-LAW CLAIMS DOES NOT MERIT REVIEW 33

CONCLUSION 35

TABLE OF AUTHORITIES

CASES

Page(s)

American Insurance Ass'n v. *Garamendi*, 539 U.S. 396 (2003) 33, 34

Bancoult v. *McNamara*, 445 F.3d 427 (D.C. Cir. 2006) 32

Boyle v. *United Technologies Corp.*, 487 U.S. 500 (1988) 31

Central Bank of Denver, N.A. v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) 30

Corrie v. *Caterpillar, Inc.*, 503 F.3d 974 (9th Cir. 2007) 32

Department of Navy v. *Egan*, 484 U.S. 518 (1988) 31

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 34

In re Agent Orange Product Liability Litigation, 517 F.3d 76 (2d Cir. 2007) 34

Joo v. *Japan*, 413 F.3d 45 (D.C. Cir. 2005) 33

Khulumani v. *Barclay National Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) 30

Koohi v. *United States*, 976 F.2d 1328 (9th Cir. 1992) 32

Kwan v. *United States*, 272 F.3d 1360 (Fed. Cir. 2001) 34

Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) ..... *passim*

Winter v. *Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008) 32

TABLE OF AUTHORITIES—Continued

Page(s)

Zschernig v. *Miller*, 389 U.S. 429 (1968) 34

DOCKETED CASES

Brief for the United States As Amicus Curiae, *American Isuzu Motors, Inc.* v. *Ntsebeza*, No. 07-919 (U.S. filed Feb. 11, 2008) 30

U.S. Statement of Interest, *In re Agent Orange Product Liability Litigation*, MDL No. 381 (E.D.N.Y. filed Jan. 12, 2005) 7

STATUTES

Alien Tort Statute, 28 U.S.C. § 1350 1

Federal Tort Claims Act, 28 U.S.C. § 2680 32

Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-2168 (1951 & Supp. 1983) 3

LEGISLATIVE MATERIALS

S. Rep. No. 91-1016 (1970) 5

116 Cong. Rec. 30,000 (1970) 5

116 Cong. Rec. 30,036 (1970) 5

116 Cong. Rec. 30,222 (1970) 5

TREATIES AND INTERNATIONAL MATERIALS

The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1546 ..... 8, 26, 28

TABLE OF AUTHORITIES—Continued

Page(s)

Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277 (Oct. 18, 1907) 8, 28

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (June 13, 2000) 28

Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 4

Protocol Additional to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3 27

Threat or Use of Nuclear Weapons, Advisory Op. No. 95, 1996 I.C.J. 226 (July 8) .. 10, 11, 17, 18, 21

OTHER AUTHORITIES

Baker, Peter, *Bush Prods Vietnamese President On Human Rights And Openness*, Wash. Post, June 23, 2007, at A2 7

Detter, Ingrid, *The Law of War* (2d ed. 2000) 19, 22

Kalshoven, Frits & Zegveld, Liesbeth, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (ICRC 2001) 17, 27, 28

Kelly, Joseph Burns, *Gas Warfare in International Law*, 9 Mil. L. Rev. 1 (1960) 19

TABLE OF AUTHORITIES—Continued

Page(s)

Krutzch, Walter & Trapp, Ralf, *A Commentary on the Chemical Weapons Convention* (1994) 20, 21

McCool, Grant, *Vietnam President seeks 'fair' treatment by U.S.*, Reuters News, June 18, 2007 7

McDougal, Myres S. & Feliciano, Florentino P., *Law and Minimum Public World Order* (1960, repr. 1994) 19

Oeter, Stefan, *Methods and Means of Combat*, in *The Handbook of Humanitarian Law in Armed Conflicts* 149 (Fleck ed. 1995) 21, 27

Thomas, D. Ann Van Wynen & Thomas, A.J., Jr., *Legal Limits on the Use of Chemical and Biological Weapons* (1970) 17, 19, 22

Written Statement of the United Kingdom, Nuclear Weapons Case (June 16, 1995), *available at* http://www.icj-cij.org/docket/files/95/8802.pdf 18

IN THE

Supreme Court of the United States

No. 08-470

VIETNAM ASSOCIATION FOR VICTIMS OF AGENT ORANGE, *et al.*,

Petitioners,

v.

DOW CHEMICAL COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

Petitioners are a putative class of Vietnamese nationals—including civilians and former combatants on both sides of the Vietnam conflict—who allege that they were injured by exposure to herbicides used by the U.S. military to destroy vegetation providing enemy cover. Unable to sue the United States directly because of sovereign immunity, petitioners have invoked the Alien Tort Statute (ATS), 28 U.S.C. § 1350, against companies that manufactured the herbicides to the government's specifications. Petitioners' central assertion is that, by supplying the herbicides, respondents aided and abetted the U.S. military's alleged

commission of war crimes during the Vietnam conflict—specifically, violations of the international-law ban on "poison and poisoned weapons," the prohibition on employing war material "calculated to cause unnecessary suffering," and the norm of proportionality. Petitioners also assert tort claims under New York law.

1. *Herbicide operations in Vietnam.* A significant challenge for U.S. and allied military operations in Vietnam was "the inability to observe the enemy in the dense forest and jungle" from which deadly ambushes were launched. C.A. App. 1374 (Assistant Secretary of Defense William Lemos). Early in the conflict, the U.S. government began exploring the use of herbicides to reduce enemy cover, as well as to destroy enemy crops. Pet. App. 3a. Government research conducted in the 1940s and 1950s had already identified and field-tested two herbicidal chemicals, the n-butyl esters of 2,4-D and 2,4,5-T. *Id.* at 9a. In 1961, the Department of Defense recommended their use for defoliation purposes in Vietnam. *Id.*

Secretary of State Dean Rusk likewise advised President Kennedy that "successful plant-killing ops ... can be of substantial assistance in the control and defeat of the [Vietcong]." C.A. App. 1339. In late 1961, President Kennedy accepted those recommendations and approved military herbicide operations in Vietnam. Pet. App. 3a.

2. *Selection and procurement of the herbicides.* In January 1962, the Air Force began the operational phase of the program in South Vietnam, using an herbicide code-named Agent Purple. Pet. App. 188a-189a. Government researchers later concluded that a 50/50 mixture of 2,4-D and 2,4,5-T was most effective; that formulation became known as Agent Orange. *Id.* at 9a.

Other herbicides used in Vietnam, Agents Green and Pink, also contained 2,4,5-T. *Id.* at 185a.

The government promulgated formal specifications regarding the design and characteristics of each desired mixture of 2,4-D and 2,4,5-T. These specifications were later incorporated into government contracts used in the procurement of Agent Orange. Pet. App. 9a. Respondents' products met those specifications in all material respects. *Id.* at 68a. The government contracts specified that the only marking on the drums of the herbicides be a "three-inch color-coded band" that corresponded to the name of each "Agent." *Id.* at 10a. Petitioners have alleged that the herbicides were contaminated with small quantities of a toxic substance known as dioxin, a byproduct generated during the manufacture of 2,4,5-T. C.A. App. 55.[1]

In 1966, concerned that the pace of production of Agent Orange was insufficient to meet its projected needs, the government decided to compel production from the manufacturers. Pet. App. 10a. Invoking the Defense Production Act of 1950, 50 U.S.C. App. §§ 2061-2168 (1951 & Supp. 1983), the government essentially commandeered all of the respondents' capacity to produce Agent Orange. *Id.*

3. *Effectiveness and legality of herbicide use.* The herbicide program was effective in serving important military objectives, including reducing the risk of ambush created by dense vegetation surrounding U.S. bases and supply routes. The military concluded that,

---

[1] The procurement and manufacture of the herbicides are discussed more fully in respondents' opposition in *Stephenson* v. *Dow Chemical Co.*, No. 08-461.

as a result of the program, "our forces have been better able to accomplish their mission with significantly reduced U.S. and Vietnamese casualties." C.A. App. 1376.

Nevertheless, as the government had expected from the outset,[2] the herbicide program proved controversial. As the district court noted: "Opposition to this herbicide program by scientists and others on the ground that it violated international law and was improper because it would cause harm to persons and land was brought to the attention of the United States beginning in early 1961." Pet. App. 209a. The Executive Branch, however, consistently concluded that the herbicide program produced substantial military benefits and was legal under existing treaties and customary international law. *See id.* at 400a-410a. In 1961, Secretary Rusk advised President Kennedy that "the use of defoliant does not violate any rule of international law concerning the conduct of chemical warfare and is an accepted tactic of war." C.A. App. 1339. In 1969, when a resolution was proposed in the United Nations General Assembly declaring that the 1925 Geneva Protocol[3] banned at least some herbicide use in warfare, the U.S. delegation rejected that interpretation, maintaining

---

[2] C.A. App. 1339 (Secretary Rusk observing that "[w]e will, of course, be the object of an intense Communist 'germ warfare' campaign which may be picked up by some neutrals").

[3] Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571. The United States ratified the Protocol in 1975, after U.S. participation in the Vietnam conflict had ended. Although in the district court petitioners relied on the Protocol in support of their war-crimes claims (*see* Pet. App. 430a-437a), they have not done so on appeal or in this Court.

that "[c]hemical herbicides ... which were unknown in 1925, could not be included" within the scope of the prohibition. *Id.* at 1394.

Congress was well aware of the controversy surrounding the herbicide program yet continued to appropriate funds for herbicide procurement.[4] Proposals by members of Congress to curtail funding to the program failed by wide margins.[5]

When President Nixon transmitted the 1925 Geneva Protocol to the Senate for ratification in 1970, Secretary of State Rogers confirmed that "[i]t is the United States' understanding of the Protocol that it does not prohibit the use in war of ... chemical herbicides." Pet. App. 30a. And in 1975, when President Ford issued an Executive Order renouncing "as a matter of national policy, first use of herbicides in war," he nevertheless reiterated the consistent U.S. position on the legality of such use. *Id.* at 30a.

4. *The end of the herbicide program.* In June 1966, a government study on the long-term health effects of certain pesticides and herbicides, including 2,4,5-T, uncovered evidence of birth defects in mice.

---

[4] *See* S. Rep. No. 91-1016, at 85-87 (1970) (in military appropriations bill, establishing levels of expenditures for development and procurement of herbicides).

[5] *See* 116 Cong. Rec. 30,036-30,055 (1970) (amendment prohibiting expenditures for the military application of anti-plant chemicals rejected by Senate vote of 62-22); *id.* at 30,222-30,227 (amendment prohibiting expenditures for the use of chemicals for crop destruction rejected 48-33); *see also id.* at 30,005 (statement of Sen. McIntyre) ("For whatever the possible side effects of our herbicide program, its primary contribution is indisputable: it has saved the lives of Americans in Vietnam.").

Pet. App. 11a. This study, known as the Bionetics Study, was received by the National Cancer Institute, a component of the National Institutes of Health, in September 1968 and was publicly released in October 1969. *Id.* The government temporarily banned use of Agent Orange in 1970 and definitively terminated the herbicide program in 1971. *Id.*

5. *Post-war relations with Vietnam.* American participation in the Vietnam conflict ended in January 1973. Pet. App. 7a. After the fall of Saigon in 1975, the United States severed relations with Vietnam and imposed a trade embargo. *Id.*

The embargo remained in place for two decades, until it was lifted by President Clinton. Pet. App. 7a. In 1995, the United States and Vietnam agreed to settle claims between the countries arising out of "the nationalization, expropriation, or taking of, or other measure directed against, properties, rights, and interests of the parties and their citizens during and after the war." *Id.* at 7a-8a (internal quotation marks omitted). That agreement makes no provision for the settlement of claims arising out of the use of Agent Orange. *Id.*

The United States and Vietnam continue to discuss issues arising out of the war. A 2002 Memorandum of Understanding provides for scientists representing both governments to cooperate to determine the effects, if any, of Agent Orange on people and ecosystems. Pet. App. 8a. In May 2007, Congress appropriated $3 million in aid towards health and environmental

issues in Vietnam,[6] though the U.S. government has never agreed with Vietnam's claims regarding a purported link between Agent Orange or dioxin and the allegedly widespread health effects suffered by the Vietnamese population.[7] In June 2007, Vietnamese President Triet met with President Bush to discuss a variety of issues, including human rights, trade, POWs, and Agent Orange.[8]

6. *The complaint.* Petitioners are a non-profit association and several Vietnamese individuals (including former members of the North Vietnamese army) seeking to represent a class of Vietnamese nationals allegedly injured by exposure to Agent Orange deployed during the Vietnam conflict. C.A. App. 37-39, 65, 75, 86-89. Petitioners do not claim that they were injured by the active components of Agent Orange, but rather by dioxin, a byproduct of the manufacturing process present in Agent Orange at extremely low levels.

Invoking the ATS, petitioners claim that, by supplying Agent Orange to the U.S. military, respondents aided and abetted the military's commission of various war crimes (C.A. App. 87, 90), including: (1) violation of

---

[6] *See* McCool, *Vietnam President seeks 'fair' treatment by U.S.*, Reuters News, June 18, 2007; *see also* Pet. App. 35a.

[7] *See, e.g.*, McCool, *supra* ("The United States maintains there is no scientifically proven link between dioxin and the three million people Vietnam estimates are disabled or suffer from its effects."); U.S. Statement of Interest 11 n.11, *In re Agent Orange Prod. Liab. Litig.*, MDL No. 381 (E.D.N.Y. filed Jan. 12, 2005) (citing judicial opinions finding insufficient evidence of harm to human health caused by Agent Orange).

[8] Baker, *Bush Prods Vietnamese President On Human Rights And Openness*, Wash. Post, June 23, 2007, at A2.

Article 23(a) of the 1907 Hague Regulations, which proscribes "employ[ing] poison or poisoned weapons";[9] (2) violation of Article 23(e) of the 1907 Hague Regulations, which proscribes employing war material "calculated to cause unnecessary suffering";[10] and (3) the international customary law norm of proportionality, codified in Article 6(b) of the London Charter, which proscribes the "wanton destruction of cities, towns or villages or devastation not justified by military necessity."[11]

Additionally, petitioners assert several tort claims under New York law, including assault and battery, infliction of emotional distress, negligence, and strict products liability. C.A. App. 93-98. Petitioners seek compensatory and punitive damages, as well as injunctive relief directing respondents to provide environmental remediation. *Id.* at 100-101.

The district court (Weinstein, J.) made available to petitioners the voluminous discovery record in *In re Agent Orange Product Liability Litigation*, MDL-381, litigation brought by U.S. military veterans and their families that was settled in 1984. Pet. App. 34a, 47a-48a. The court also allowed discovery into matters particular to this case. C.A. App. 223-224.

---

[9] Annex to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 36 Stat. 2277, 2302 (Oct. 18, 1907) ("Hague Regulations").

[10] *Id.*

[11] The Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, Aug. 8, 1945, 59 Stat. 1546, 1547 ("London Charter").

Respondents filed several dispositive motions, and both sides submitted extensive expert opinions on the relevant points of international law.[12] The United States filed a statement of interest seeking dismissal of the ATS claims on the grounds, *inter alia*, that they were nonjusticiable and that they also failed the standard set out in *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004), where this Court admonished that "federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted."

7. *District court's decision.* Judge Weinstein dismissed the ATS claims in their entirety, holding that none satisfied the standard set out in *Sosa*. With regard to petitioners' poison claim, he held that the "imprecise scope" of the Hague Regulations' prohibition on the use of poison and the "uncertainty as to whether that prohibition even applies to lethal chemical weapons designed to kill human beings" are fatal to any claim that the poison proscription "sets forth a sufficient definite prohibition" that could satisfy *Sosa*. Pet. App. 427a. Judge Weinstein added that even if the poison proscription were broadly construed, it would not apply to respondents' provision of herbicides "regardless of whether they have collateral harmful consequences on humans" because "this proscription would reach only those materials that were intentionally de-

---

[12] Petitioners' experts were Professors George P. Fletcher and Jordan J. Paust. Respondents' experts were Professors Kenneth Howard Anderson, Jr. and W. Michael Reisman.

signed to inflict poisoning as a means of combat." *Id.* (internal quotation marks omitted).

Judge Weinstein also granted summary judgment for respondents on the state-law claims, ruling that those claims were barred by the government contractor defense, as the court had ruled in a related case brought by U.S. veterans. Pet. App. 176a.[13]

8. *Court of appeals' decision.* The court of appeals affirmed the dismissal of the ATS claims.[14] The court held that "Plaintiffs' claim that 'defendants manufactured[ed] and suppli[ed] a[n] herbicide laced with poison' and used as a defoliant fails to satisfy the standard set forth by the Supreme Court in *Sosa* for recognition of a tort in violation of international law." Pet. App. 32a (alterations in court of appeals' decision).

The court explained that the Hague Regulations' poison proscription is "certainly categorical, ... but its scope is nevertheless undefined and has remained so for a century." Pet. App. 26a. The court relied on, among other authorities, the International Court of Justice's decision recognizing that the Hague Regulations nowhere define the critical term "poison" and that "'different interpretations exist on the issue.'" *Id.* (quoting Threat or Use of Nuclear Weapons, Advisory Op. No. 95, 1996 I.C.J. 226, 248 ¶ 55 (July 8) ("*Nuclear*

---

[13] The district court, however, rejected respondents' alternative grounds for dismissal, including respondents' contention, supported by the United States, that the ATS claims are nonjusticiable. *See* Pet. App. 283a-317a.

[14] The same panel issued decisions that day in favor of respondents on the government contractor defense and federal officer removal in the U.S. veterans' cases.

Weapons Opinion")). The court further stated that, at most, petitioners had established a "customary international norm proscribing the *purposeful use of poison* as a weapon against human beings." *Id.* at 32a (emphasis added). That norm, however, was "inapplicable in this case" (*id.*) because petitioners "nowhere allege that the government intended to harm human beings through its use of Agent Orange" (*id.* at 26a). The court concluded that there is a "lack of a consensus in the international community with respect to whether the proscription against poison would apply to defoliants that had possible unintended toxic side effects, as opposed to chemicals intended to kill combatants." *Id.*

The court of appeals also rejected petitioners' claim based on the norm proscribing war material "calculated to cause unnecessary suffering" and the related norm of proportionality. Pet. App. 28a. The court observed that even petitioners' expert acknowledged that those norms entail case-by-case balancing of competing interests and therefore lack the definite and specific content required by *Sosa*. *Id.* at 31a. The court also held that violation of those norms requires a level of "intentionality that Plaintiffs cannot establish." *Id.* at 31a (referring to the Hague Regulations' prohibition on war material "*calculated*" to cause unnecessary suffering and the proportionality norm's proscription on "*wanton* destruction").

With respect to the state-law claims, the court of appeals upheld the district court's grant of summary judgment to respondents on the government contractor defense. Pet. App. 34a. The court of appeals' decision adopted the analysis in the companion decision involving U.S. veterans. *Id.*

ARGUMENT

Petitioners' allegations of error do not merit this Court's review. Petitioners make no assertion that the Second Circuit's rejection of their ATS claims conflicts with the decision of another court of appeals. Instead, petitioners contend (Pet. 7) that the Second Circuit's decision conflicts with this Court's decision in *Sosa*. Petitioners, however, make no claim that the Second Circuit misapprehended the *Sosa* standard in any particular manner. Petitioners' argument thus reduces to a request that this Court correct the Second Circuit's application of settled law to the facts of this particular case, a submission that rarely warrants this Court's review.

Moreover, the court of appeals was eminently correct in holding that petitioners' claims do not satisfy *Sosa*'s "demanding standard." 542 U.S. at 738 n.30. Petitioners have failed to show that there has ever been an international consensus that the 1907 Hague Regulations' proscription on "employ[ing] poison or poisoned weapons" extended so broadly as to prohibit the use of an herbicide to kill vegetation, which use allegedly had unintended but foreseeable toxic effects on humans. And petitioners' "unnecessary suffering" and "proportionality" claims rely upon norms that even international tribunals consider too difficult to administer; those norms manifestly lack the "definite content" and "clear definition" required by *Sosa*, 542 U.S. at 732 & 733 n.21. Petitioners' allegations of case-specific procedural error are likewise unworthy of review. They are also unfounded; the court of appeals properly credited all of petitioners' factual allegations and applied the correct standard on a motion to dismiss.

Prudential considerations further weigh against this Court's review. Even if petitioners' ATS claims satisfied *Sosa*'s acceptance and specificity requirements, several alternative grounds support their dismissal. Petitioners' claims depend on corporate and aiding-and-abetting liability, but neither is cognizable in an ATS action. In addition, the prudential considerations noted in *Sosa*, including case-specific deference to the Executive Branch, independently counsel against recognizing a cause of action here. Moreover, because petitioners' claims are cognizable only insofar as they are incorporated into federal common law, they are subject to federal common law defenses. Here, the government contractor defense and other federal defenses bar petitioners' claims under the ATS just as they bar their state-law claims. Petitioners' claims are also nonjusticiable because they would necessitate second-guessing the Executive's decision to employ Agent Orange on the battlefield in Vietnam and would interfere with the Political Branches' prerogatives in conducting diplomacy and resolving disputes with Vietnam.

The Second Circuit's resolution of petitioners' state-law claims also does not merit review. For the reasons given in respondents' opposition to the petition in *Stephenson* v. *Dow Chemical Co.*, No. 08-461, the court of appeals' decision on the government contractor defense accords with this Court's leading decision on the issue and does not conflict with that of another court of appeals. But even if the U.S. veterans' state-law claims could proceed, those of the Vietnamese nationals may not. As damages claims by foreign nationals alleging injury from the wartime conduct of the U.S. military and its contractors, petitioners' claims are preempted by the federal foreign affairs power.

I. PETITIONERS ASSERT NO SPLIT OF AUTHORITY BETWEEN THE COURTS OF APPEALS, AND THEIR REQUEST FOR ERROR CORRECTION UNDER *SOSA* DOES NOT MERIT REVIEW

Petitioners notably do not contend that the Second Circuit misapprehended the *Sosa* standard or applied it in a manner that creates a conflict with another court of appeals. Rather, petitioners argue that the court of appeals misapplied *Sosa* to their particular international law claims. Petitioners also make the unlikely argument that the court of appeals ignored the standard that applies on a motion to dismiss. These contentions are without merit.

A. The *Sosa* Standard

This Court made clear in *Sosa* that the ATS is "a jurisdictional statute creating no new causes of action." *Sosa*, 542 U.S. at 724. At the same time, federal courts possess authority to recognize, as a matter of federal common law, a "narrow set" of actions derived from the law of nations. *Id.* at 721.

Sosa repeatedly admonished courts to exercise "great caution," 542 U.S. at 728, "restraint," *id.* at 725, and "vigilant doorkeeping," *id.* at 729, and to apply a "demanding standard," *id.* at 738 n.30, in determining which asserted international-law norms to recognize as actionable under federal common law. This restraint is necessary given the circumscribed role federal courts have in creating common law and recognizing private rights of action without legislative guidance, *id.* at 726-727, and the risks of "impinging on the discretion of the Legislative and Executive branches in managing foreign affairs," *id.* at 727. Accordingly, any claim based on the "present-day law of nations" must, at a minimum, be "accepted by the civilized world and defined

with a specificity comparable to the features of the 18th-century paradigms" described by Blackstone and accepted at the time of the ATS's enactment, *id.* at 725: "violation of safe conducts, infringement of the rights of ambassadors, and piracy," *id.* at 724; *see also id.* at 732 (courts should not recognize norms "with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted").

Applying this standard, *Sosa* rejected the "arbitrary arrest" claim asserted by plaintiff Alvarez, a Mexican national who allegedly had been abducted from Mexico by persons hired by the DEA, detained for less than one day, and then transferred to federal custody to stand trial in the United States. The Court reasoned that, whether or not there was a sufficiently accepted norm against arbitrary detention, violation of such a norm would require "a factual basis beyond relatively brief detention in excess of positive authority." 542 U.S. at 737. The Court concluded: "It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authority and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy." *Id.* at 738.

B. The Second Circuit Correctly Determined That Petitioners' Poison Claim Fails *Sosa*'s Standard

Petitioners' central claim is that respondents' provision of Agent Orange to the U.S. military—while allegedly knowing that it contained "unnecessary and excessively high levels of dioxin"—aided and abetted the military's violation of the Hague Regulations' proscrip-

tion on "poison or poisoned weapons."[15] Pet. 2, 9. But a century of state practice refutes petitioners' novel assertion that the poison proscription extends so far as to prohibit the use of an herbicide to kill vegetation, even if that use has unintended but allegedly foreseeable toxic effects on humans. And petitioners certainly have not shown that this was the understanding of the poison proscription at the time of the Vietnam conflict.[16] Like the plaintiff in *Sosa*, petitioners "cite[] little authority that a rule so broad ha[d] the status of a binding ... norm." 542 U.S. at 736.

1. The Poison Proscription Fails The *Sosa* Standard Because It Is A Highly General Norm, Whose Operative Scope Is Vague And Has Been Applied Narrowly

There is no dispute that international law has long prohibited the use of "poison" during war. That ancient norm, however, has always existed at a high level of generality. C.A. App. 2084 (Anderson). Beyond a handful of specific, historically accepted applications of that norm—such as the prohibitions against poisoned arrows and bullets and the poisoning of wells—there is

---

[15] Petitioners make no argument that international law prohibits the military use of herbicides per se. *See* Pet. 6. Nor do they dispute that vegetation providing enemy cover and crops used by enemy forces are permissible military targets. *See* C.A. App. 1308-1311 (Anderson).

[16] Because petitioners' claims arise out of the Vietnam conflict, they must establish that an actionable norm was in place at that time. *See* Pet. *i* (recognizing that the *Sosa* issue is analyzed in terms of international law at the time of the Vietnam conflict); *see also* C.A. App. 1284 (Anderson) ("[I]t is crucial to look at the law that was in force when the disputed actions took place.").

not now, and never has been; a consensus in the international community as to what the poison proscription encompasses. *Id.* As the International Court of Justice (ICJ) recognized in a 1996 decision holding that the poisonous radioactive fallout from nuclear weapons does not violate the poison proscription, the 1907 Hague Regulations nowhere define the operative term "poison" and "different interpretations exist on the issue." *Nuclear Weapons Opinion*, 1996 I.C.J. 226 ¶ 55. Commentators have also noted this lack of consensus:

> The Hague interdiction of poison has been subject to so many differences of opinion among legal authorities in relation to chemical-biological agents that it becomes impossible to point with any certainty to its relevance as to any prohibitory effect in the chemical-biological field.... [D]isputes exist as to whether certain agents are poison so as to fall within this rule; whether agents would be encompassed if not in existence prior to 1907; and whether the rule was intended to apply to chemical-biological weapons in any event.

Thomas & Thomas, *Legal Limits on the Use of Chemical and Biological Weapons* 57 (1970).[17] Thus, while an international norm against poisoning exists, that norm exists at too high a level of generality to be actionable under *Sosa*. *See Sosa*, 542 U.S. at 736 n.27 (holding that Alvarez's evidence "does show that many nations rec-

---

[17] As a result, a treatise published by the International Committee of the Red Cross comments that Article 23(a)'s prohibition "is of mainly historical interest." Kalshoven & Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* 42 (ICRC 2001).

ognize a norm against arbitrary detention, but that consensus is at a high level of generality"); *id.* at 732 (requiring that a norm be "sufficiently definite").

Petitioners seek to surmount this obstacle by invoking the "plain" meaning of the word "poison" and suggesting that courts need only conclude that dioxin falls within that definition to let their claim go forward. Pet. 15. That approach is not one that has been followed in recognizing proscriptions against the use of weapons or material in wartime. *See* C.A. App. 2089-2090 (Anderson). Rather, as the ICJ recognized, state practice has been to construe the poison proscription narrowly and to have specific weapons "declared illegal by specific instruments." *Nuclear Weapons Opinion*, 1996 I.C.J. at 248 ¶ 57.[18]

For example, as noted above, although the use of nuclear weapons would cause massive poisonous radiation, the ICJ determined that such use would not run afoul of the poison proscription. *See Nuclear Weapons Opinion*, 1996 I.C.J. at 248 ¶¶ 53-57. Similarly, the parties to the 1907 Hague Regulations did not even agree that the poison proscription applied to the use of *poisonous gas weapons* to kill enemy troops in World War I. The Germans, British, and French all used poison gas extensively in that war, less than a decade after

---

[18] *See also* Written Statement of the United Kingdom, Nuclear Weapons Case ¶¶ 3.88-3.89 (June 16, 1995), *available at* http://www.icj-cij.org/docket/files/95/8802.pdf ("[I]t is a fundamental principle of the law of treaties that a prohibitive rule, purporting to exclude a particular activity from the scope of permissible State practice, must be clearly stated.... [O]ne cannot, therefore, infer from general words, or a treaty of general application, a prohibitive rule of specific content[.]").

adoption of the Hague Regulations, and the United States was prepared to do so too, although the Armistice made that unnecessary. C.A. App. 1286 (Anderson). Those states thought it necessary later to negotiate a specific treaty, the 1925 Geneva Protocol, to outlaw the use of poisonous gas as a weapon. *See id.* at 1286-1287 (Anderson) (this "state practice demonstrates that the term in fact has had a narrow legal meaning that has not included such weapons.").[19]

Thus, while the poison proscription has served as an important general norm in the law of war, it is not itself actionable; prohibitions against the use of poison can be enforced under *Sosa* only if and when they are embodied by the international community in concrete prohibitions regarding specific weapons. There was no such prohibition on herbicides with toxic effects in place at the time of the Vietnam conflict. Nor is there one even today; notably, the wartime use of herbicides

---

[19] Petitioners' challenge to this account (Pet. 17-18) is unconvincing. The Versailles Commission's report did list the "use of deleterious and asphyxiating gases" as a violation committed during World War I, but petitioners merely speculate, and unpersuasively, that this was a reference to the 1907 Hague Regulations' poison proscription. The reference was more likely to the Hague Gas Declaration of 1899, which prohibited "the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases." *See* Thomas & Thomas, *supra*, at 46-49, 57 (the Gas Declaration's "sole object" language rendered it of "little usefulness," thus necessitating the 1925 Geneva Protocol). In any event, the weight of authority is against petitioners. *See, e.g.*, C.A. App. 1287 (Anderson) (noting that the 1956 U.S. Army Field Manual stated that the poison proscription did not encompass poisonous gases); *id.* at 1146 (Reisman); Kelly, *Gas Warfare in International Law*, 9 Mil. L. Rev. 1, 44 (1960); McDougal & Feliciano, *Law and Minimum Public World Order* 619 (1960, repr. 1994); Detter, *The Law of War* 252-253 (2d ed. 2000).

is not prohibited by the modern Chemical Weapons Convention of 1993, "even ... if the (secondary) effect of such use were the killing or harming of people." Krutzch & Trapp, *A Commentary on the Chemical Weapons Convention* 30 (1994).

2. Petitioners' Claim Independently Fails Because There Is No Allegation That Agent Orange Was Used With The Purpose Of Poisoning Human Beings

Petitioners' claim also fails for the independent reason that the proscription on "employ[ing] poison or poisonous weapons" applies only to conduct undertaken with the *purpose* of poisoning human beings. Thus, even putting aside the fact that the anti-poisoning norm is too general to satisfy *Sosa*, petitioners' allegation of knowing but unintentional poisoning is insufficient to state a violation of that norm. *See Sosa*, 542 U.S. at 738 (holding that, whether or not there was a binding norm against arbitrary detention, "[i]t is enough to hold that a single illegal detention of less than a day ... violates no norm of customary international law so well defined as to support the creation of a federal remedy"). There has never been a widely accepted and specific bar on use of chemicals designed and deployed for other purposes, such as defoliation, even if that use might foreseeably result in injury to humans.[20]

As reflected in the historically accepted applications of the poison proscription (*e.g.*, dipping arrows or

---

[20] *See* C.A. App. 1147 (Reisman) ("Even if herbicides could have harmful consequences for humans, such substances would not be considered poisonous under Article 23(a) if the intentional design of the material was not to inflict poisoning as a means of combat." (internal quotation marks omitted)).

bullets in poison or contaminating wells with corpses), the anti-poisoning norm reaches only conduct designed to kill people by means of poisoning. In its submission to the ICJ in the *Nuclear Weapons* case, the United States stated its longstanding view that Article 23(a)'s poison proscription "was not intended to apply, and has not been applied, to weapons that are designed to injure or cause destruction by other means, even though they may also create toxic byproducts." C.A. App. 1288 (Anderson) (quoting U.S. submission to the ICJ); *see also id.* (citing similar British submission). The ICJ agreed that the foreseeable poisonous effects of nuclear weapons are insufficient to bring those weapons under the poison proscription. That proscription, the court observed, has been "understood, in the practice of States, ... as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate." *Nuclear Weapons Opinion*, 1996 I.C.J. at 248 ¶ 55. Even under the Chemical Weapons Convention of 1993, "[h]erbicides will not be regarded as chemical weapons if used with an intent to destroy plants." Krutzch & Trapp, *supra*, at 30.

Commentators confirm that the intent to poison humans is essential to the poison proscription. *See, e.g.*, Oeter, *Methods and Means of Combat*, in *The Handbook of Humanitarian Law in Armed Conflicts* 149 (Fleck ed. 1995) (stating that "[o]nly in so far as the poisoning effect is the intended result of the use of the substances concerned does the use of such munitions qualify as a use of 'poisonous gases'" and contrasting situations where "the asphyxiating or poisoning effect is merely a side-effect of a physical mechanism in-

/

tended principally to cause totally different results");[21] Detter, *supra*, at 252 (poison proscription covers "weapons *deliberately* contaminated with germs or poisonous agents" (emphasis added)); Thomas & Thomas, *supra*, at 53 (poison proscription "relates to the use of poison to *injure or destroy* the *person* of the enemy" (emphasis added)).

Petitioners do not allege that respondents (or the U.S. military) purposefully used Agent Orange to poison human beings. Rather, they allege only that respondents knew that dioxin was toxic to humans and that "precautions in the manufacturing process ... could sharply limit the risk of contamination." C.A. App. 55, 60.[22] But as demonstrated by the ICJ's *Nuclear Weapons* opinion, knowledge of poisonous effects is insufficient to violate the poison proscription. Recognizing petitioners' claim of unintended but foreseeable poisoning would contravene *Sosa*'s admonition that courts do

---

[21] As Anderson points out, Oeter's discussion addresses both the Hague Regulations' poison proscription and the 1925 Geneva Protocol. C.A. App. 1289 n.48.

[22] Despite petitioners' belated assertion (*see* Pet. 13 ("From [respondents'] knowledge, the court can infer intent to poison even though specific intent is not required.")), their amended complaint nowhere alleges that respondents acted with the intent to poison humans. Elsewhere, the petition accurately summarizes the complaint's allegations against respondents as involving only *knowledge* of toxicity. *See, e.g.*, Pet. 2 ("respondents ... manufactured and supplied these chemicals to the government knowing they contained unnecessary and excessively high levels of dioxin"); *id.* at 4 n.1 ("respondents ... knew of the presence and toxicity of dioxin in Agent Orange ... but delivered the highly contaminated product to the government anyway"); *id.* at 13; *see also* C.A. App. 1737-1738 (petitioners' expert recognizing that Agent Orange was "not used as [a] means of directly attacking enemy troops").

not have a "mandate to seek out and define new and debatable violations of the law of nations." 542 U.S. at 728.

3. Petitioners' Other Allegations Of Error Lack Merit

As shown above, there has never been an international consensus that the poison proscription applied to respondents' alleged conduct. Petitioners seek to sidestep that point by faulting the court of appeals for making two supposed errors. Neither allegation has merit.

First, petitioners assert that the court of appeals ignored the applicable standard for a motion to dismiss, failed to credit petitioners' factual allegations, and, as a result, considered only the legality of herbicides per se, rather than the legality of herbicides containing a poisonous substance, dioxin. Pet. 5-6, 20. That contention is meritless. The court of appeals properly identified the standard of review that applies on a motion to dismiss. *See* Pet. App. 16a. The court also properly credited all of petitioners' factual allegations, including their allegation that respondents supplied, and the U.S. military used, an "herbicide laced with poison." *Id.* at 32a.[23] Had the court not accepted petitioners' allegations regarding the poisonous properties of dioxin, there would have been little reason for it to have held, for example,

---

[23] Because the court of appeals accepted petitioners' allegation of an "herbicide laced with poison" (Pet. App. 32a), there was nothing improper about that court's generic references to Agent Orange as an "herbicide." *See* Pet. 5-6. Petitioners themselves refer to Agent Orange in this manner—as an herbicide that contained a poison. *See id.* at 2, 6. And contrary to petitioners' assertion (*id.* at 4 n.1), the district court also accepted petitioners' allegation that "[d]ioxin is a poison." Pet. App. 232a.

that alleged poisonous effects are insufficient because the poison proscription applies only where there is an *intent* to poison human beings. *Id.* There is no plausible claim that the court of appeals somehow missed the central issue in this case.

Second, petitioners argue (Pet. 10-12) that two opinions written by Department of Defense officials[24] demonstrate that, at the time of the Vietnam conflict, the Hague Regulations' poison proscription encompassed the use of herbicides with unintended toxic effects. Petitioners' heavy reliance on those opinions is unwarranted.

As the United States explained in its Second Circuit amicus brief ("U.S. Br."), the Cramer and Buzhardt opinions are fully consistent with the government's understanding that the Hague Regulations' poison proscription does not apply to the use of herbicides to destroy foliage and enemy crops, even if such use had unintended but foreseeable toxic effects on humans. *See* U.S. Br. 26 n.5. Cramer's opinion, for instance, concluded that the "United States is not bound by any treaty which specifically excludes or restricts the use of chemicals, *whether toxic or nontoxic*, in time of war." C.A. App. 1490 (emphasis added); *see also id.* at 1491 (proceeding to analyze the issue assuming, counterfactually, that "Article 23(a) is held to apply to toxic chemical substances").

---

[24] Defense Department General Counsel J. Fred Buzhardt issued his opinion letter to the Senate Committee on Foreign Relations on April 5, 1971, in the context of the Committee's hearings on the 1925 Geneva Protocol. The letter attached an earlier opinion by Major General Myron C. Cramer, The Judge Advocate General, War Department, dated March 1945.

In addressing the legality of herbicide use, both Cramer and Buzhardt addressed a fact pattern susceptible to categorical analysis. They concluded that it would be legal to use herbicides "for defoliation or the destruction of crops, provided that their use against crops does not cause such crops as food to be poisoned nor cause human beings to be poisoned by direct contact, and such use must not cause unnecessary destruction of enemy property." C.A. App. 1485 (Buzhardt); *see also id.* at 1490 (Cramer) (similar). Petitioners argue (Pet. 11-13) that Cramer and Buzhardt intended a negative inference to follow—namely, that if the use of herbicides against vegetation or enemy crops results (even unintentionally) in the poisoning of humans, then such use is prohibited by international law. But that interpretive leap is unsubstantiated. Cramer, for example, made clear that he was not expressing an ultimate conclusion on that issue, stating: "Should further experimentation disclose that they [herbicides] are toxic to human beings, I will be pleased to express my opinion on the facts which may be presented for consideration." C.A. App. 1490. Buzhardt did not analyze the fact pattern of an herbicide with toxic effects, and his opinion nowhere endorsed the negative inference petitioners urge.[25] The Cramer and Buzhardt opinions thus lend no support to petitioners' argument.

---

[25] Even were petitioners' negative inferences correct, nothing supports the notion that such a prohibition would be based on Article 23(a)'s poison proscription. Rather, when Buzhardt mentioned the issue of whether herbicides are "harmless to man," he suggested that the issue would be relevant under Article 23(e)'s prohibition on weapons "calculated to cause unnecessary suffering." C.A. App. 1487. As discussed below, however, Article 23(e)'s proscription lacks the definiteness necessary under *Sosa*. *See in-*

C. The Court Of Appeals Correctly Determined That Petitioners' Claims Based On The Norm Of Proportionality And The Related Norm Against "Unnecessary Suffering" Fail Under *Sosa*

Petitioners also argue that the court of appeals erred in affirming the dismissal of their claims based on the norm of proportionality[26] and the Hague Regulations' prohibition on the use of war material "calculated" to cause "unnecessary suffering." Pet. 18. The court of appeals, however, correctly held that "[t]hese norms are simply too indefinite to satisfy *Sosa*'s specificity requirement." Pet. App. 31a. The court was also correct that both norms require mental states that petitioners have not alleged. *Id.* at 32a.

First, these norms reflect broad aspirational goals rather than specific, actionable obligations of the kind that could satisfy *Sosa*'s requirements. As petitioners' expert acknowledged:

> [N]orms that depend on modifiers such as "disproportionate" or "unnecessary" ... invite a case-by-case balancing of competing interests. When the balancing of competing interests governs the interpretation of a norm, black-letter rules become vague and easily manipulated. They lose the definite and specific con-

---

fra pp. 26-29. Likewise, Cramer discussed the issue of herbicides with potentially toxic effects in the context of a customary international law prohibition on "poisonous gases and those causing unnecessary suffering." C.A. App. 1490.

[26] This norm prohibits "wanton destruction of cities, towns or villages, or devastation not justified by military necessity." *See* London Charter art. 6(b), 59 Stat. at 1547.

> tent *Sosa* seems to demand for recovery under the ATS.

C.A. App. 1717 (Fletcher). Two leading commentators have characterized Article 23(e)'s "unnecessary suffering" prohibition as "too vague to produce by itself a great many practical results." Kalshoven & Zegveld, *supra*, at 41-42. Stefan Oeter, a scholar petitioners rely upon in this context (Pet. 18-19), observes with respect to "unnecessary suffering" that it is "difficult to find an adequate description of the effects of weaponry which are intended to be outlawed by the choice of that wording." Oeter, *supra*, at 115.[27]

Similarly, with respect to the proportionality norm, the Final Report to the International Criminal Tribunal for Yugoslavia (ICTY) Prosecutor on the NATO bombing in Kosovo stated:

> The main problem with the principle of proportionality is not whether or not it exists but what it means and how it is to be applied.... It is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances because the comparison is often between unlike quantities and values. One cannot easily assess the value of innocent human lives as opposed to capturing a particular military objective.

---

[27] Petitioners also refer to "superfluous injury" (Pet. 18-19), but that concept was introduced by Optional Protocol I to the Geneva Conventions, which came into force only in 1979 and to which the United States is not a party. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, 1125 U.N.T.S. 3.

Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia ¶ 48 (June 13, 2000).[28] Such a norm is manifestly not one defined with the specificity required by *Sosa*.[29]

Second, the court of appeals correctly held that these claims fail for the independent reason that they require mental states that petitioners do not allege. The proportionality norm prohibits "*wanton* destruction." 59 Stat. at 1547 (emphasis added). Its violation requires "obvious intentional depravity." C.A. App. 1302 (Anderson). Similarly, Article 23(e) of the Hague Regulations proscribes the use of war material "*calculated* to cause unnecessary suffering." 36 Stat. at 2302 (emphasis added). This refers to war material designed to

---

[28] *See also* Kalshoven & Zegveld, *supra*, at 46 (noting the "lack of precision inherent in [the proportionality norm]"); C.A. App. 1301 (Anderson) (deciding whether military action was proportional is an "inherently open-ended, imprecise and subjective" task).

[29] Petitioners argue (Pet. 19) that because they have alleged that the dioxin in Agent Orange served no "military use," the application of these norms is clear in this case and would require no balancing of competing interests. The issue, however, is not simply whether some feature of a particular instrument of war serves a "military use," but also the effort necessary to change or remove the challenged feature. Respondents, for instance, would present evidence that reducing dioxin levels would have slowed the production process, thus harming the military's interest in rapid production of Agent Orange. Thus, adjudicating petitioners' claims would necessarily require the uncertain balancing of interests that renders these norms unenforceable under *Sosa*.

> cause additional, and unnecessary, injury to a combatant *already* rendered *hors de combat* by some other means. Thus, for example, a bullet treated with an agent designed to inflame a wound is illegal because the bullet will suffice to render the combatant *hors de combat* and the inflammation is superfluous and unnecessary.

C.A. App. 1290 (Anderson). Even petitioners do not go so far as to suggest that the U.S. government deployed Agent Orange with the deliberate purpose of causing wanton harm, nor could they. Given these necessary mental states, petitioners' allegation that respondents supplied an herbicide with unintended, foreseeable toxic side effects is insufficient.

II. Several Alternative Grounds Support Dismissal Of Petitioners' ATS Claims

Prudential considerations also weigh against granting petitioners' request for review. Even if petitioners were correct that their claims satisfied *Sosa*'s acceptance and specificity requirements, several alternative grounds would warrant dismissal of their claims.[30]

First, under *Sosa*, a court must ascertain not only whether international law specifically proscribes the conduct alleged, but also "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued." 542 U.S. at 732 n.20. Here, petitioners' claims fail because interna-

---

[30] The district court rejected these alternative arguments, and the court of appeals did not reach them given its affirmance on other grounds. *See* Pet. App. 33a-34a.

tional law has never extended liability for war crimes to corporations. *See* C.A. App. 1312-1316 (Anderson). No corporation was prosecuted at Nuremberg, and even in the drafting of the modern Rome Statute, corporate liability was rejected for lack of international consensus. *See Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 321-326 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (explaining that, under *Sosa*, there is no widely accepted norm of corporate liability), *aff'd under 28 U.S.C. § 2109 in absence of a quorum sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 128 S. Ct. 2424 (2008).

Second, respondents are alleged only to have aided and abetted the U.S. military's violation of international law (rather than to have committed primary violations of their own). *See* C.A. App. 37, 83, 90. Aiding-and-abetting, however, is not cognizable in an ATS action. International law prescribes standards only for *criminal* aiding-and-abetting liability, and under federal common law the doctrine's applicability in the *civil* context is "at best uncertain." *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994).[31]

Third, the "requirement of clear definition is not meant to be the only principle limiting the availability

---

[31] *See also Sosa*, 542 U.S. at 726 (instructing courts to "look for legislative guidance before exercising innovative authority over substantive law"); Brief for the United States As Amicus Curiae, *American Isuzu Motors, Inc.* v. *Ntsebeza*, No. 07-919 (U.S. filed Feb. 11, 2008) (arguing that aiding-and-abetting liability is not cognizable in ATS actions). *But see Khulumani*, 504 F.3d at 260 (per curiam) (holding that aiding and abetting is cognizable in ATS actions).

of relief" in ATS actions. *Sosa*, 542 U.S. at 733 n.21. In deciding whether to recognize a cause of action, courts should consider various prudential factors, such as "legislative guidance," *id.* at 726; "the possible collateral consequences of making international rules privately actionable," *id.* at 727; and "case-specific deference to the political branches," *id.* at 733 n.21. Given the military determinations made by three Administrations, with Congress's support, to use Agent Orange in the Vietnam conflict, and given that Agent Orange is still the subject of ongoing diplomatic negotiations, a court should exercise its discretion against recognizing a cause of action here. *See* U.S. Br. 1 (seeking dismissal); *see also Department of Navy* v. *Egan*, 484 U.S. 518, 530 (1988) (courts should decline to read even facially applicable statutes to authorize intrusions "upon the authority of the Executive in military and national security affairs" absent evidence that "Congress specifically has provided otherwise").

Fourth, because ATS claims are cognizable, if at all, only as a matter of federal common law, the courts' imposition of liability must conform to federal policies, including those embodied in legislative enactments. Here, the government contractor defense that barred petitioners' state-law claims[32] should also preclude their ATS claims. *See generally Boyle* v. *United Techs. Corp.*, 487 U.S. 500 (1988); *see also* U.S. Br. 39 (noting that a "huge damages award" in an ATS action would "wreak havoc on the United States military's ability to secure needed war materials at a reasonable cost"). Petitioners' claims are also barred by the policies expressed in the "combatant activities" exception to the

---

[32] *See* Pet. App. 34a; *see also infra* pp. 34-35.

Federal Tort Claims Act, *see* 28 U.S.C. § 2680(j), which recognizes that "no duty of reasonable care is owed to those against whom force is directed as a result of authorized military action." *Koohi* v. *United States*, 976 F.2d 1328, 1337 (9th Cir. 1992). Imposing liability on contractors that supply the instruments of war would "create a duty of care where the combatant activities exception is intended to ensure that none exists." *Id.* (dismissing claims against manufacturer of air defense system used by U.S. navy in accidental shooting of Iranian aircraft).

Finally, petitioners' ATS claims are nonjusticiable. Petitioners' claims would necessitate second-guessing the Executive's military decision, backed by Congress, to use Agent Orange on the battlefield and would require an unprecedented judicial determination that the U.S. military (aided and abetted by respondents) committed systematic war crimes. *Cf. Winter* v. *Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 377 (2008) (stressing that the Court "gives great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest" (internal quotation marks omitted)).[33] Agent

---

[33] *See also Bancoult* v. *McNamara*, 445 F.3d 427, 437 (D.C. Cir. 2006) (dismissing ATS action alleging that the U.S. government forcibly depopulated islands in the Indian Ocean: "If we were to hold that ... the executive's actions in depopulating the islands and constructing the [military] base had to comport with some minimum level of protections, we would be meddling in foreign affairs beyond our institutional competence."); *Corrie* v. *Caterpillar, Inc.*, 503 F.3d 974, 983 (9th Cir. 2007) (dismissing ATS action against Caterpillar for selling bulldozers to the Israeli military while allegedly knowing of their use to destroy Palestinian houses, where the U.S. government approved and financed each sale: "[The court] cannot intrude into our government's decision to

Orange is also the subject of ongoing diplomacy, and the adjudication of petitioners' claims would interfere with the Political Branches' prerogatives in making peace with Vietnam. *Cf. American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 421 (2003) (whether to "[v]indicat[e] victims injured by acts and omissions of enemy corporations in wartime is ... within the traditional subject matter of foreign policy"); *Joo* v. *Japan*, 413 F.3d 45, 50 (D.C. Cir. 2005) (governments have treated "private claims [arising from war] as ... counters, 'chips,' in international bargaining" (internal quotation marks omitted)).

III. The Second Circuit's Decision Upholding The Dismissal Of Petitioners' State-Law Claims Does Not Merit Review

The court of appeals' decision affirming the dismissal of petitioners' New York-law tort claims also does not merit review. As explained in respondents' opposition to the petition in *Stephenson*, which is adopted here, the court of appeals' analysis of the government contractor defense conforms to *Boyle* and does not conflict with the decision of another court of appeals.

In any event, this case would make a poor vehicle for reviewing the government contractor issue. First, the court of appeals' decision in the instant case contained no substantive discussion of the contractor defense, but rather referred to the discussion in the U.S. veterans' case. Pet. App. 34a (citing *In re Agent Or-*

---

grant military assistance to Israel, even indirectly by deciding this challenge to a defense contractor's sales.").

ange Prod. Liab. Litig., 517 F.3d 76 (2d Cir. 2008), *petition for cert. pending*, 08-461).

Second, whether or not the government contractor defense issue is worthy of review in the veterans' cases, the Vietnamese petitioners' state-law claims are independently preempted for another reason. The Constitution entrusts the federal government with "full and exclusive responsibility" for the conduct of foreign affairs, *Hines* v. *Davidowitz*, 312 U.S. 52, 63 (1941), and therefore preempts state action that interferes with the federal government's exercise of its foreign relations power, *see, e.g.*, *Zschernig* v. *Miller*, 389 U.S. 429, 441 (1968). As damages claims by foreign nationals alleging injury from the wartime conduct of the U.S. military and its contractors, petitioners' claims fall within the traditional ambit of federal, not state, competence. *See Garamendi*, 539 U.S. at 404, 416; *cf. Kwan* v. *United States*, 272 F.3d 1360, 1364 (Fed. Cir. 2001) (bilateral negotiations regarding compensation for Korean veterans are "consigned to the executive branch in its conduct of foreign relations"). The effects of Agent Orange are the subject of continuing diplomacy (alongside other issues such as human rights, trade, and POWs). Permitting petitioners' state-law claims to proceed—particularly in the form of the massive class action they propose—would necessarily "undercut[] the President's diplomatic discretion" and give him "less to offer and less diplomatic leverage as a consequence." *Garamendi*, 539 U.S. at 423-424 (internal quotation marks omitted). In light of New York's minimal interest in the matter, the federal foreign affairs power thus independently preempts petitioners' state-law claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
MARY K. GARDNER
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 663-6000

JANUARY 2009